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## Was Amerindian Dispossession Lawful? The Response of 19th-Century Maritime Intellectuals

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*In the half-century ending about the time of Confederation a dozen writers addressed awkward questions about an earlier generation's dispossession of Maritime Amerindians from land and resources: had it been lawful; if so, how; if not, what should be done? In the main they approached it as an abstract question, divorced from those particulars of local history that would become the focus of late-20th-century investigation. Those who theorized that English tradition made dispossession lawful did so with reference to the doctrine of "discovery" or to the proposition, grounded in Locke and accepted widely in colonial public opinion, that Amerindian possession of any particular spot had been too casual to give rise to a property right. Those who argued the illegality of Amerindian dispossession, the most insistent of whom was S. T. Rand, pointed out that colonials themselves did not act consistently with the Lockean "agricultural" argument and that indicia of ancient aboriginal territorial possession were overwhelming. Maritime discussion of the issue seems to have ended in the 1860s, when jurisdiction over Amerindian affairs was transferred to the new federal administration at Ottawa.*

*Dans la cinquantaine d'années qui a précédé la Confédération, une douzaine d'auteurs ont soulevé des questions embarrassante au sujet du traitement réservé aux Amérindiens des Maritimes, lesquels ont été dépossédés de leurs terres et de leurs ressources par les générations antérieures de colons. Était-ce licite? Si oui, en vertu de quelle loi? Sinon, comment pouvait-on redresser les torts? Le débat resta essentiellement abstrait, les intervenants s'abstenant généralement de faire état des cas concrets dans la région, ceux-là mêmes qui allaient se retrouver sous les feux de la rampe à la fin du XX<sup>e</sup> siècle. Ceux qui voyaient dans la dépossession un acte licite sanctionné par la tradition britannique s'appuyaient sur la doctrine de la découverte ou sur la proposition de Locke, ayant droit de cité dans la pensée coloniale de l'époque et selon laquelle les Amérindiens ne demeuraient jamais assez longtemps dans un endroit pour établir un droit de propriété quelconque. Les détracteurs de cette proposition, dont S.T. Rand était le plus passionné, soulignaient que les colonialistes n'agissaient pas toujours en accord avec les préceptes de leur propre doctrine agricole, d'inspiration lockéenne, et qu'il existait des preuves abondantes de l'occupation des terres par les autochtones depuis les temps ancestraux. Dans les Maritimes, le débat semble s'être étiolé dans les années 1860 avec le transfert des pouvoirs en matière d'affaires autochtones à la nouvelle administration fédérale, à Ottawa.*

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Was the dispossession of aboriginals in ancient times unlawful? If aboriginal dispossession was lawful, then how was this so precisely? If aboriginal dispossession was not lawful, then what is the remedy for so great a wrong committed so long ago? What sort of title did Amerindians have in the land they occupied? Does the common law tradition take account of tribal, as opposed to individual, rights? Is there enough Crown land remaining to afford adequate compensation; or, in view of all the changes wrought by time, would it be better to compensate in a way that allows for participation in the contemporary economy rather than supposing that they must live as their ancestors lived? What do aboriginals themselves say on these issues?

All of these perplexing questions, associated commonly with the final decades of the 20th century, were anticipated in the Maritime colonies between the 1820s and the 1860s by a band of what one writer called “theoretical men”. The present offering draws attention to this forgotten, stillborn line of speculation by way of contributing to exploration of the majority culture’s conduct towards Maritime Amerindians in the comparatively little-studied 19th century. In view of L.F.S. Upton’s path-breaking research leading to *Micmacs and Colonists* it may seem odd or ungrateful to characterize the 19th century as little studied. However, while the stimulus of Maritime treaty litigation, culminating in the expert evidence of W.C. Wicken and S.E. Patterson at the *Marshall* trial, has revolutionized scholarly understanding of relations between Amerindians and Europeans in the 18th century, understanding of the 19th century remains practically where Upton left it in 1979. Indeed, it was only curiosity to trace how those long-sought 18th-century treaties were forgotten by the 19th century that led unexpectedly to the accounts of dispossession introduced here. Although the resulting essay may resemble one of those stories of colonist-Amerindian relations in which the Amerindian voices remain unheard, it is offered as a look at how self-conscious colonials brought their sense of legal tradition to bear on a fundamental problem. Few of them were lawyers, it is true, but in the 19th century notions of “British justice” were diffused widely in colonial society.<sup>1</sup>

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1. See L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979) [hereinafter *Micmacs and Colonists*]; G. Marquis, “In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture” (1993) 42 U.N.B.L.J. 69 at 76-91.

## I. "Crime . . . Sophistry . . . Obscurity"

Aboriginal dispossession was a political fact in the Maritime colonies by the end of the 18th century but nearly all writing on its lawfulness dates from a later stage in the colonies' intellectual development.<sup>2</sup> There was a land question transfixing 18th-century Nova Scotia, but it involved not Amerindians but the Acadians. Government justified Acadian dispossession on a theory that those who refused to swear allegiance to the king were aliens and, as such, could not have tenure of real property. So acute was this land question that, to make the colony attractive to prospective New England settlers of vacated Acadian farms, the General Assembly passed a 1759 statute explaining why Acadians never did have lawful title and then, for greater certainty, extinguishing any title that they might have had.<sup>3</sup> Curiously, as it would seem later, there was no corresponding Nova Scotia act extinguishing aboriginal title, and none of the 18th-century treaties between the Crown and Maritime aboriginals settled the issue. However, it would be wrong to infer from such silence, and from the fact that writing on the subject dates from rather later, that 18th-century officialdom was unaware that its claim to any particular tract in the colony was problematic *vis-à-vis* Amerindians. Preoccupied by the struggle to secure the region from France, the occupiers may have avoided addressing the moral and legal quality of their presence most of the time, but those with connections in other seaboard colonies must have known that aboriginal land interest had been recognized there on occasion.<sup>4</sup> Moreover, Chief Justice Belcher's 1761 assurance to Micmac chiefs that the colony's laws would be "like a great Hedge about your Rights and properties" echoed the protective promise of government's most recent treaties. Such a stance seems inconsistent with an assumption that

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2. In physical terms, the process of aboriginal dispossession may be said to have begun in 1749 and lasted until enforcement of the game laws in the late 19th and early 20th centuries. However, a *policy* of disregarding the interests and claims of aboriginals was in place in all three Maritime colonies before 1800. It was a mostly inarticulate policy, but its reality was plain enough in land-granting practice.

3. D.H. Brown, "Foundations of British Policy in the Acadian Expulsion: A Discussion of Land Tenure and the Oath of Allegiance" (1977-78) 55 *Dalhousie Rev.* 709; *Act for the Quieting of Possessions of the Protestant Grantees of the Lands Formerly Occupied by the French Inhabitants*, S.N.S. 1759, c. 3 [hereinafter *Act for the Quieting of Possessions*]. In the 1750s "Nova Scotia" meant just the peninsula and arguably what later became New Brunswick, but the end of the French wars enlarged the colony's boundaries to include the entire Maritime region. Prince Edward Island was separated in 1769 and New Brunswick in 1784.

4. *E.g.*, scores of 17th-century deeds from Maine aboriginals to settlers, some reserving annual quitrents. Divergent views of the extent to which 17th-century English colonists, particularly New Englanders, recognized Amerindian property rights in practice are offered in J.W. Springer, "American Indians and the Law of Real Property in Colonial New England" (1986) 30 *Am. J. Legal Hist.* 25; F. Jennings, *Invasion of America: Indians, Colonialism, and the Cant of Conquest* (1975) (New York: Norton, 1976) at c. 8.

Amerindians had no such rights and properties.<sup>5</sup> Accordingly, when 19th-century Maritime intellectuals—preachers, teachers, lawyers, chroniclers—looked back on 18th-century Nova Scotia, some of them knew enough to sense an acute question of legitimacy and lawfulness in land tenure. Given its Acadian component, this might be said to be the central theme of 18th-century Nova Scotia history prior to the Revolution.

No one who wrote of Amerindians in the 19th century failed to observe that the race that had once had mastery of the Maritimes was verging rapidly on extinction.<sup>6</sup> Of literally scores of observers who professed to

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5. "Ceremonials at Concluding a Peace with the several Districts of the general Mickmack Nation of Indians in His Majesty's Province of Nova Scotia, and a Copy of the [Shediac] Treaty" (25 June 1761) P[ublic] R[ecord] O[ffice], CO 217, vol 18. Despite the logic of this deduction, it may be that Belcher was promising equal protection of laws rather than contemplating Amerindian property rights in land; compare Lt.-Gov. William Dummer's speech in *Conference with the Eastern Indians, at the Ratification of the Peace, held at Falmouth in Casco-Bay, in July and August, 1726* (Boston: Eliot, 1726) at 11-12. What Micmacs would have understood Belcher to say is another question still. The great difficulty faced by any student of the legal aspect of Amerindian-colonial relations—whether Belcher (1710-1776), Beamish Murdoch (1800-1876), or historians today—is that there never was a definitive, widely accepted or official account of Amerindian real property. Between the 16th century and the Revolution, influential men espoused every conceivable opinion and rationale in classifying Amerindians' political and property status, varying over time, from jurisdiction to jurisdiction, and between theory and practice; one legal historian has pronounced this a "discursive chaos": R.A. Williams, *American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) at 271 [hereinafter *American Indian in Western Legal Thought*]. It is true that, with the proclamation of 1763, the Imperial government came close to official recognition of some manner of Amerindian property rights in (mostly) trans-Appalachian territories, and that Chief Justice Marshall later grafted that nascent policy into US law. However, the proclamation came too late to affect understanding of the property rights of Amerindians in Nova Scotia, although O.P. Dickason suggests that British experience in Nova Scotia and Maine "did much set the scene" for it: "Amerindians between French and English in Nova Scotia, 1713-1763" in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 45, 60-61. In the Maritime provinces was there a single reference to the proclamation's aboriginal land provisions prior to the 20th century?

6. Thomas Irwin (*d.* 1847), the Charlottetown teacher and Micmac linguist, thought that colonials welcomed extinction of the aboriginals "in whose lawful inheritance they riot": [*Halifax*] *Novascotian* (29 August 1832); *Dictionary of Canadian Biography* vol. 7 at 436-38 [hereinafter *DCB*]. A dismayed Walter Bromley (1775-1838) recorded three anecdotes of Nova Scotians who rejoiced at the demographic trend and wished to join in the process of extirpation "in order to make room for the whites, who were more industrious and intelligent": *Mr. Bromley's Second Address, on the Deplorable State of the Indians* (Halifax: Recorder Office, 1814) [Canadian Institute for Historical Microreproductions CIHM 20998] at 27, 30 [hereinafter *Second Address*]; W. Bromley, *Two Addresses on the Deplorable State of the Indians* (London: T. Hamilton, 1815) at 6 ("they thought it no greater sin to shoot an Indian than a Bear or a Carraboo") [hereinafter *Two Addresses*]. He hints that one prop for such an attitude was the erroneous notion that Maritime Amerindians had never submitted to become subjects of the Crown: *Second Address, ibid.* at 37. For a synopsis of Bromley's work, see J. Fingard, "English Humanitarianism and the Colonial Mind: Walter Bromley in Nova Scotia, 1813-25", (1973) 54 *Can. Historical Rev.* 123 ("the Nova Scotian 'Las Casas'"); *DCB, ibid.* at 107-10.

find this a poignant truth, perhaps a dozen were willing to look behind the fact of aboriginal dispossession and inquire whether it had been lawful.<sup>7</sup> There was much reason to avert the eyes from so awkward a subject. Expropriation of aboriginals was an apparently immutable fact everywhere that European settlers had penetrated in the New World. Until the census of 1861 all Maritime commentators admitted that one consequence of dispossession and the disordered lifestyle it entailed was that the aboriginal race was heading down to the grave. “[T]heir gradual extinction”, wrote the Saint John novelist Douglas Huyghue, was caused “directly, by lawless appropriation of their hunting grounds, to utter violation of every principle of justice.” Naturally, then, dispossession of Amerindians, even more than expulsion of Acadians, was a subject that subsequent occupiers of their lands preferred not to contemplate. In the weary analysis of the humanitarian Walter Bromley, following Tacitus, “it belongs to human nature to hate the man whom you have injured”. “[D]eprived of that country peculiarly their own, which gave them birth, and which they had inherited from antiquity”, why did they not wage “perpetual war against us”, he wondered. A generation later Huyghue, incredulous at the dominant society’s moral amnesia, lamented that “sophistry or a guilty conscience” had combined to “shroud” the public’s consciousness of this “injustice and crime” behind an “impenetrable veil of obscurity”.<sup>8</sup> This “terrible truth”, he thundered, “though it burn to the core, must not be salved over with the unction of smooth phrases”. Like Huyghue himself, however, a few “theoretical men” were willing on occasion to look past the fact of dispossession and ask “what authority have we to become the general possessors of the Indian territory, to the

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7. This number omits two well-known intellectuals whom one would expect to find discussed. The Windsor lawyer-historian T.C. Haliburton’s two-volume *Historical and Statistical Account of Nova-Scotia* (Halifax: J. Howe, 1829) [CIHM 35690] [hereinafter *Historical and Statistical Account*] makes only the faintest allusion to aboriginal dispossession. His earlier *General Description of Nova Scotia* (Halifax: Royal Acadian School, 1823) [CIHM 35672] contains the most valuable 19th-century account of the Micmacs, but it was almost certainly written by Walter Bromley and held so little interest for Haliburton that he omitted it entirely from *Historical and Statistical Account of Nova-Scotia*. In contrast, the Saint John lawyer and sometime Indian commissioner M.H. Perley was both a noted philo-indiginee and a writer on New Brunswick Amerindians in several genres. However, while he collected historical documents on Maritime aboriginals and made occasional comments on 18th-century treaties, he seems to have left no writing on the original dispossession.

8. *Second Address*, *supra* note 6 at 29; S.D.S. Huyghue, *Argimou: A Legend of the Micmac* (1841) (G. Davies, ed.) (Sackville N.B.: Mount Allison University, 1979) at 2. On Huyghue (1816-1891), see J.K. Keefer, *Under Eastern Eyes: A Critical Reading of Maritime Fiction* (Toronto: University of Toronto Press, 1987) at 110-15; J. Reid, *Myth, Symbol, and Colonial Encounter: British and Mi’kmaq in Acadia, 1700-1867* (Ottawa: University of Ottawa Press, 1995) at 62-65 [hereinafter *Myth, Symbol, and Colonial Encounter*].

total exclusion of its original possessors".<sup>9</sup> In a limited sense one may say that there was "debate" on the question, though with little of the conspicuous public engagement that characterized mid/late 19th-century historiographical controversy over expulsion of the Acadians.<sup>10</sup>

## II. "The Right of the European Nations to Dispossess"

"A question has often been suggested by theoretical men", wrote a young Halifax lawyer in 1832, "as to the right of the European nations to dispossess the aboriginal inhabitants of America, of the territories of the new world." In fact, Beamish Murdoch is one of only two Maritime writers located as yet who attempted to reconcile dispossession of Amerindians with legal theory, and it may be significant that he and his later Saint John counterpart, William Jarvis, were lawyer-historians. Both men were uncomfortable with the subject, gave it a couple of pages, and seemed to wish to pass on quickly. A legal-historical outlook allowed them to perceive the force of the question, but both chose to treat it as one of abstract property theory, divorced from local Nova Scotia experience. Echoing Blackstone, Jarvis apologized that considerations of justice or injustice were no part of his inquiry. Murdoch, in his legal writings, said that the wrong done aboriginals was a question for historians but, when he himself turned out an 1800-page history of his native province, he left the subject of dispossession unmentioned.<sup>11</sup> In seeking to insulate themselves from moral considerations behind a veil of legal theory, Murdoch and Jarvis encountered a difficulty: what legal theory? There was, as indeed there is, no well accepted account of how the aboriginal interest in land could have been extinguished originally in a way that the common

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9. This formulation of the question is by W. Bromley in *Appeal to the Virtue and Good Sense of the Inhabitants of Great Britain, &c in Behalf of the Indians of North America* (Halifax: E. Ward, 1820) [CIHM 92714] at 5 [hereinafter *Appeal to the Virtue and Good Sense*].

10. M.B. Taylor, *Promoters, Patriots and Partisans: Historiography in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1989) at 186-206. In contrast to the historiography of Acadian dispossession that Taylor discusses, the 19th-century "debate" over aboriginal dispossession was not sufficiently visible to attract his notice.

11. B. Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 2 (Halifax: J. Howe, 1832) [CIHM 59437] at 56 [hereinafter *Epitome*, vol. 2]; B. Murdoch, *History of Nova Scotia, or Acadie* (Halifax: J. Barnes, 1865-67) [CIHM 37227] [hereinafter *History of Nova Scotia*]; W.M. Jarvis, "The Title to the Soil and Early History of the Territory of New Brunswick": New Brunswick Museum, Jarvis Papers, box 23, folder 3 [hereinafter "Title to the Soil"]; W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 105. Although Jarvis (1838-1921) ranks as New Brunswick's first legal historian, his only works to reach publication were Church of England controversial literature and a well-known edition of Thomas Carleton's commission and instructions. The concern of his substantial essay on "title to the soil" was tracing the British claim against France; comments on the Amerindian property interest were almost incidental. He appears to have composed it between 1866 and 1869.

law tradition would acknowledge as lawful. The Spanish, in contrast, had an articulate official theory of usurpation, resting on conquest, but Maritime writers on both sides of the issue agreed that English conduct in the New World must be distanced from that of notoriously cruel *conquistadores*.<sup>12</sup> Accordingly, no one suggested, and the perceptive Silas Rand denied expressly, that conquest was the legal explanation of how Micmacs and Maliseets had been dispossessed.<sup>13</sup> Moreover, as a matter of history, there had been no out-and-out European conquest of the Maritimes *vis-à-vis* aboriginal inhabitants; even had there been, the fact of conquest went to the issue of national sovereignty, not the land tenure of inhabitants.

In practice English colonial governments sought to ground their usurpation in the consent of Amerindians as manifested in treaties, a strategy markedly unlike that of either the Spanish or French. The English felt some sort of cultural need to point to a written instrument by which aboriginals agreed to extinguish their claims.<sup>14</sup> In the case of Nova Scotia, however, Murdoch and Jarvis could not take the route of attributing dispossession to the many 18th-century treaties between Crown and aboriginals. The familiar generalization that Nova Scotia treaties do not deal with land is overbroad but it is true, nonetheless, that all of them originated in the wake of active or threatened hostilities and concern mainly restoration and maintenance of peace. Of the benchmark treaties only the series of 1760-61, coinciding with arrival of New England planters to take up vacated Acadian sites, contemplated interaction between aboriginals and the settlement frontier; even here, land is mentioned only incidentally.<sup>15</sup> Amerindians retained a continuous, lively

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12. *Second Address*, *supra* note 6 at 21; *General Description of Nova Scotia*, *supra* note 7 at 46; *Epitome*, vol. 2, *ibid.* at 56-57. It is hardly possible to overstate the determination of English colonial theorists to distinguish their nation's treatment of Amerindians from that of Spain. On the other hand, in "Two Addresses", *supra* note 6 at 5-6, Bromley charged that "the British settlers of this colony will be registered with a Cortes and a Pizaro". All of this being said, there is a sense in which "conquest"—perhaps "discovery" as a sort of virtual conquest—offers the only coherent explanation of how the Crown is said to hold underlying title to Amerindian lands.

13. [*Halifax*] *Christian Messenger*, 22 March 1855.

14. C.G. Calloway, *Dawnland Encounters: Indians and Europeans in Northern New England* (Hanover N.H.: University of New England Press, 1991) at 16-17; K.M. Morrison, *Embattled Northeast: The Elusive Ideal of Alliance in Abenaki-Euramerican Relations* (Berkeley: University of California Press, 1984) at 128, 170-71; *Micmacs and Colonists*, *supra* note 1 at 37.

15. As these remarks imply, I am not among those who understand the Treaty of Boston (Dummer's Treaty), 1725 (which does deal with land) as intended to extend to Nova Scotia. On the other hand, I leave open the possibility that there are unincorporated or "lost" government treaty promises in the 1760s and possibly the 1780s touching land. It is impractical to enter into treaty questions here.



treaty myth in oral tradition from the 18th century to the present, but in the majority culture those long-wished-for treaties were soon lost in the archives. Had Maritime treaties been explicit in ceding land to government, or in reserving land to Amerindians, as was so in the rest of what became Canada, colonists would not have forgotten them. Accordingly, when some 19th-century Maritimers addressed the legitimacy of the dispossession, they could not cut short the question by attributing it to consent.

Another possible way to account in legal terms for aboriginal dispossession was the so-called doctrine of discovery: Giovanni Caboto had arrived in 1497 and through some legal nicety secured all North America for England. This is what William Jarvis was prepared to assert and, when he sat down in the 1860s to prepare an essay on title to the soil in New Brunswick, his eye fell on the wording of that remarkable 1759 statute extinguishing Acadian titles. In drafting it Jonathan Belcher asserted, and the legislature affirmed, that Nova Scotia or Acadie “did always of right belong to the Crown of England, both by priority of discovery and ancient possession.” While it is possible to confine the discovery doctrine to prioritizing rival European claims and helping establish a colony’s reception date for English law, Jarvis understood it as extinguishing aboriginal land interests apart from occupancy; US Chief Justice Marshall, also, had accepted the doctrine in that light in *Johnson v. M’Intosh* in 1823. Interestingly, Beamish Murdoch did not. Writing possibly without knowing of Marshall’s analysis, he pronounced it as having “but little foundation in reason.”<sup>16</sup>

The core argument for the lawfulness of aboriginal dispossession was the negative proposition that aboriginals lacked property rights in the first place, so there could have been no dispossession from those rights. This is the whole of Murdoch’s case; Jarvis echoes it and, as noted below, those who argued against the lawfulness of dispossession acknowledged its force. The argument runs as follows: Amerindians did not improve the soil; they did not appropriate any particular part for their own use; they did not assert exclusivity; therefore, in the eyes of the common law, their rights were so negligibly thin as to disintegrate automatically wherever

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16. *Act for the Quieting of Possessions*, preamble; “Title to the Soil”, *supra* note 11; *Johnson v. M’Intosh*, 21 U.S. 543 (1823) [hereinafter *Johnson*]; *Epitome*, vol. 2, *supra* note 12 at 56. Marshall himself indicated later that the discovery doctrine was incredible; his use of it in *Johnson* is attacked as incompetent in L.G. Robertson, “John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine” (1997) 13 *J. Law & Politics* 759; S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 42-47.

the European invader set literal or constructive foot.<sup>17</sup> Jarvis formulated the argument in these terms: in the era of discovery Nova Scotia was “occupied only by wandering tribes, whose small numbers, roving dispositions, and unfitness for the duties and employments of more civilized life, rendered hopeless the improvement of the soil”. Development of the “wealth of the territory” required what he referred to delicately as “more liberal management”.<sup>18</sup> Less circumspect was the language of Beamish Murdoch, who brought to this issue a rhetorical excitement absent from the generality of his prose.

The question has often been suggested by theoretical men, as to the right of the European nations to dispossess the aboriginal inhabitants . . . [O]ur own nation and . . . France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the caribou, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternately destroying each other or attacking the beasts of the forest.<sup>19</sup>

Framing his argument this way allowed Murdoch to distinguish between the Spanish and Portuguese invasion of the agricultural civilizations of Central and South America which, he implies, was unjust, and the English and French colonization of North America, the original inhabitants of which had no idea of property in the relevant, European sense of exclusive possession. If they had no idea of property, then they had no property; if they had no property, then there could have been no dispossession, so the question of the lawfulness of that dispossession did not arise.

Evidently Murdoch considered that his vivid proposition that, if Amerindians owned land, then we might say that moose and bear had title as so evident in theory and necessary from economic considerations that he did not bother to locate it in authority, though in a note he adds that James Kent’s *Commentaries* had just come to hand which, he was glad

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17. T. Flanagan, “The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy” (1989) 22 Can. J. Pol. Sci. 589.

18. Jarvis then notes the analysis, highlighted in Chief Justice Marshall’s gloss on the Proclamation of 1763, that the Crown recognized Amerindians as having a present right of occupancy, albeit one which it could extinguish at will.

19. *Epitome*, vol. 2, *supra* note 12 at 56-57. It is natural to wonder whether Murdoch’s vivid prose was provoked by Bromley’s *Two Addresses*, *supra* note 6. As noted above, Bromley’s pamphlet contains a passage likening Nova Scotians to the worst of the *conquistadores* and deploring the attitude of those who considered Amerindians as no better than bear and caribou. Murdoch’s treatment, by way of parallel, distinguishes the English occupation from that of the Spanish and equates Amerindian land rights with those of bear and caribou.

to see, argued along the same lines.<sup>20</sup> In general terms, however, one can find this sort of argument as early as writings of Christopher Columbus and, indeed, to ancient European folk distrust of wilderness.<sup>21</sup> As Murdoch appears to have been familiar already with Thomas Hutchinson's history of Massachusetts, he may have noticed it sketched there.<sup>22</sup> Culturally, the precise source of this "agricultural" argument—that uncultivated land was not possessed closely enough to constitute property—is the fifth chapter of John Locke's *Essay Concerning the True Original, Extent, and End of Civil-Government*.<sup>23</sup>

Setting aside the moral question, which Murdoch said was not for lawyers, is one to suppose that he *believed* that the original inhabitants of North America had no legal possession of which they might be dispossessed? The answer to this may lie in the fact that, as an enthusiastic

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20. J. Kent, *Commentaries on American Law*, vol. 3 (New York: O. Halsted, 1828) at 308-15 [hereinafter *Commentaries*, vol. 3]. Kent's somewhat ill-organized treatment is so superior to Murdoch's that the latter's surprising comment that he had composed his own remarks prior to seeing what Kent had published some years earlier and the US cases to which Kent refers seems plausible; other references to Kent have a similarly last-minute character. That Murdoch should point this out to readers by way of lengthy footnotes (unusual in his work) suggests recognition that his own treatment of the subject was shallow. In the same footnote, Murdoch notices specially Kent's reliance on the property theory developed in Emmerich de Vattel's *Droit des gens* (1758). I do not understand this as indicating that Murdoch's own analysis was influenced by reading Vattel, but note P.V. Girard's discovery of what may be Murdoch's copy of an English edition of *Droit des gens* in the law library of Dalhousie University. Girard's commentary on Murdoch's softening attitude towards Micmacs is found in *Patriot Jurist: Beamish Murdoch of Halifax, 1800-1876* (Ph.D. Thesis, Dalhousie University 1998) at 294-302 [unpublished]; detailed synopsis of the Amerindian content of Murdoch's three-volume *History of Nova-Scotia* (*supra*, note 11) is offered in P.D. Clarke, *Makers of Acadian History in the 19th Century* (Ph.D. Thesis, Université Laval 1988) at 385-426 [unpublished]. One concludes that, while Murdoch's remarks about bear and caribou are uncharacteristic, his work evinces conventional uninterest in Maritime Amerindians and their history; possibly his preface to volume 3 of *History of Nova-Scotia* can be understood as a slight, belated apology for this deficiency.

21. J.R. Stilgoe, *Common Landscape of America, 1580 to 1845* (New Haven, Conn.: Yale University Press, 1982) at 7-12, 21-24; G. Wynn, "'Deplorably Dark and Demoralized Lumberers'? Rhetoric and Reality in Early Nineteenth-Century New Brunswick" (1980) 24 *J. Forest Hist.* 168; *Myth, Symbol, and Colonial Encounter*, *supra* note 8 at 31-33, 39-40.

22. T. Hutchinson, *History of the Colony and Province of Massachusetts-Bay*, vol. 2 (Cambridge MA: Harvard University Press, 1936) at 200.

23. A vigorous argument that Locke's chapter on property was framed for the very purpose of justifying aboriginal dispossession is offered in B. Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996). Locke was but one of a number of western European thinkers (Murdoch's "theoretical men") who responded to discovery of the New World by conceptualizing property in a way that legitimized usurpation of Amerindian lands, but by the 19th century, his eminence in the Anglo-American political tradition gave his property analysis canonical status: J. Locke, *Two Treatises of Government* (1689) (P. Laslett, ed.) (Cambridge: Cambridge University Press, 1967) at 303-20; *American Indian in Western Legal Thought*, *supra* note 5 at 246-51.

colonial expositor of the common law, Murdoch could accept such an analysis as the dictate of theory without feeling called on to believe (or disbelieve) it literally. He wrote the passage in question by way of introducing a primer on English land law, understanding of which required the forensic mind to embrace fundamental propositions of theory with only the most attenuated relation to the post-feudal, let alone American, world. In a sort of standard apologia James Kent called it a “technical and artificial” system, replete with “technical rules and fictions”.<sup>24</sup> Cultivation of such a mindset helps explain the content, if not the extravagance, of Murdoch’s deductions concerning the land rights of Amerindians and caribou. The fact that he could assume that, within a generation or so, Micmacs and Maliseets would disappear may have made it easier to dwell only in the realm of theory.

### III. “*In Right and in Equity*”

That the Lockean argument that rights in land arose only from appropriation and improvement was accepted widely is confirmed by writings of 19th-century Maritimers who decried aboriginal dispossession. Walter Bromley acknowledged it as “the favourite principle of white Colonists, that the claims of Savages to grounds which they can only occupy for hunting, ought not to arrest the progress of civilization”.<sup>25</sup> Typical of the intellectual stance of most philo-indigenes was that of the polymath Abraham Gesner, himself a sometime Indian commissioner. In 1847 Gesner declared that, although the “title” of the original inhabitants to the soil of America was indisputable, they had been “driven back step by step, until their names and places of abode should nowhere be known”; “the treachery, injustice, and cruelty with which these simple aborigines were treated by the early Colonists, forms some of the darkest pages in the history of the world”. While Gesner was willing to affirm that Amerindians had been “dispossessed of their unalienable rights” yet, perhaps reflecting on the implications of that analysis, he hastened to add that this great injustice had been allowed by Providence for the extension of human industry and happiness.<sup>26</sup> Gesner’s equivocation paralleled that of Andrew Brown, Church of Scotland minister and would-be Nova Scotia provincial historian. Although the introduction to his long-projected history classifies native Americans as “children” marked by “inferiority”, it excoriates their dispossession from what he, too, called “unalien-

24. *Commentaries*, vol. 3, *supra* note 20 at 307.

25. *Appeal to the Virtue and Good Sense*, *supra* note 9 at 18.

26. A. Gesner, *New Brunswick; with Notes for Emigrants* (London: Simmonds & Ward, 1847) [CIHM 35386] 2. On Gesner (1797-1864) see *DCB* vol. 9 at 308-12.

able” rights. “The original pretensions of the Europeans to property & power in the New World”, he wrote, “had . . . no foundation in right”. “They began in usurpation, were maintained by force, & had no validity but what convention gave y<sup>m</sup>.” The English had not been as wicked as the Spaniards but they had fallen far short of the New Amsterdam Dutch, who claimed no authority over the Iroquois.<sup>27</sup> Yet even Brown, who labelled aboriginals as sheep and Europeans as the wolves, conceded that Amerindians’ “desultory life [was] undeniable”, implying that inefficient resource use was a heavy mark against them.

Of those who asserted that aboriginal dispossession was not just regrettable but wrong, the humanitarian and linguist Silas Rand was the boldest. In the first half of the 1850s Rand, affected by the Micmac’s own sense of dispossession, put the issue of theft of aboriginal land in sharper focus than anyone before or since. What must Maritimers have thought when they heard him shout from the platform in 1854:

Shame on us! We invade the territory of men, made like ourselves, and fashioned in the image of God . . . —we treat them as though they had no rights. We seize upon their country. We rob them of their lands. We drive them from their homes. We plunder them of all they hold dear and sacred; we deceive and defraud them—we violate the most solemn treaties made with them; we impoverish, degrade, despise and abuse them. . . .<sup>28</sup>

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27. N[atational] A[rchives], MG 21, Add. Mss (Andrew Brown Papers), vol 19075, ff 18-19, 77-78. On Brown (1763-1834) see *DCB* vol. 6 at 87-89. Of some development in the US in the 1790s Brown wrote privately:

What is it that has taken possession of the Indians? To think of reclaiming lands already granted is the most visionary idea that ever entered the head of a red man. Poor creatures!: quoted in N. McMahon, *Andrew Brown and the Writing of Acadian History* (MA thesis: Queen’s University, 1981) at 107.

28. [*Halifax*] *Christian Messenger* (15 March 1855). On Rand, see D.M. Lovesey, *To Be a Pilgrim: A Biography of Silas Tertius Rand, 1810-1889, Nineteenth Century Protestant Missionary to the Micmac* (Hantsport, N.S.: Baptist Historical Committee, 1992) at 44-45, 52-53, 107-25. Dressed in the costume of an “Indian chief”, Rand lectured on “The Claims and Prospects of the Micmacs” in October 1854; the [*Halifax*] *Christian Messenger* printed a condensed version on 15, 22, 29 March and 8 May 1855. This composition is far more particular on issues of dispossession and remedy than his earlier *Short Statement of Facts Relating to the History, Manners, Customs, Language, and Literature of the Micmac Tribe of Indians, in Nova-Scotia and P.E. Island* (Halifax: J. Bowes, 1850) [CIHM 39506] and later *Short Account of the Lord’s Work among the Micmac Indians with Some Reasons for His Seceding from the Baptist Denomination* (Halifax: W. MacNab, 1873) and *Micmac Mission* (1882) [CIHM 12363].

Unlike Brown and Gesner, he would not equivocate but confronted the agricultural argument head on.

[T]he Indians of this Province have been treated as though they had no claims and no rights; and grave ministers . . . and lawyers and others, will still ask with all seriousness, “Why, you don[’]t mean to say that the Indians ever had a right to this country, do you? That’s a queer idea. They had no titles,—they did not cultivate it.[”]

The question may be simplified. Can naked savages, or savages clothed in skins, *possess property*? Can they have a title to lands? Or can *forests* and *wild lands* be held in “fee simple?” Or can lands be owned and occupied by “companies” [*i.e.*, collectively]? If justice and law decide either of these questions in the negative, the Indian[’]s title fails—the land in the case was never his.

In other words, was cultivation really the only index of property? Was it impossible to have property in unimproved land, such as forest? Did the common law have no place for tribal, as opposed to individual, rights? For Rand, mere articulation of such questions led on to the answer that reason demanded.

But the idea is absurd, the idea that an illiterate man, or a savage, as we may please to call him, cannot possess property. In the sight of God and man, and according to the plainest dictates of reason, whatever . . . he finds which has no other owner, belongs to him; his being educated or uneducated, civilized, saint, or savage, has nothing to do in the case.<sup>29</sup>

In Rand’s way of thinking, the source of Amerindian title to the Maritimes was ancient occupation. However obvious this conclusion, it was Rand alone who articulated it. He was moved to do so because, to a degree surpassing even Bromley, he was willing to listen to aboriginals themselves. From them he learned of their traditional territories and well-understood boundaries. He recorded accounts of their warfare whereby they had fought to exclude others, notably Mohawks, from their land. In their innumerable names for rivers, mountains and other geographical features he recognized profound and eloquent evidence of ancient possession.

As a Calvinist Baptist missionary rather than a lawyer, Rand’s conflation of possession, title, tenure and ownership would have struck Beamish Murdoch as lacking nuance, but his argument was clear enough. What was it supposed to mean in practical terms? While the underlying motive for those who decried aboriginal dispossession was awakening humanitarian concern, a few writers were able to imagine compensating modern-day Maritime Amerindians for the injury done to their ancestral posses-

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29. [Halifax] *Christian Messenger* (22 March 1855).

sion. Early in the century Bromley hinted at the issue when he wondered whether Maritime colonists lacked the “virtue” to “restore the Indian to his legitimate rights, or are guilty of a mean hypocrisy in suffering a collusive evasion of them”.<sup>30</sup> In 1841 Arthur Blackwood of the Colonial Office wrote privately that Nova Scotia’s Indians had “an equitable right to be compensated” for “usurpation” of their “ancient landed possessions”. The measure of compensation would be to “place and maintain them in a condition of at least equal advantage with that which they would have enjoyed in their original State”. However, he thought that there was so little Crown land remaining that it was “impossible to grant the Micmacs any proportion of territory that would be at all commensurate with their claims”. Accordingly, nothing of that nature could be done.<sup>31</sup> A few years later a British traveller in Nova Scotia also raised this idea of “restitution of territory”, albeit to dismiss it as absurd.<sup>32</sup> The boldest articulation came from Rand. “[W]hat does the Indian of Nova-Scotia claim?”, he asked rhetorically in 1854. “[H]e claims that in right and in equity nearly the whole of this country belongs to the Micmac Tribe, and he complains that it has been unjustly wrested from them by us, and that we will neither make restitution, nor yet acknowledge the debt.” Rand’s own proposal was a 7-point program of what he called “restitution” and “reparation”.<sup>33</sup> At its core was a plan to compensate the Micmac tribe financially for usurpation of ancestral lands.

#### IV. “Into the Regions of Fable”

“The history of all nations runs back into the regions of fable”: so wrote Silas Rand in 1853, introducing a popular essay on Micmac legends.<sup>34</sup> Had Rand been lawyer enough to understand the common law accepted by the Beamish Murdochs as precluding aboriginal entitlement, he might have transformed that aphorism into a mordant observation on the role of

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30. *Appeal to the Virtue and Good Sense*, *supra* note 9 at 5.

31. Undated minute on the state of Nova Scotia Amerindians, annexed to Lord Falkland to Colonial Secretary, 15 July 1841: PRO CO 217/178.

32. C. Hardy, *Sporting Adventures in the New World*, vol. 2 (London: Hurst & Blackett, 1855) [CIHM 45078] at 220. Hardy (1831-1919) was a member of Rand’s Micmac Missionary Society.

33. [*Halifax*] *Christian Messenger* (8 May 1855): (1) Cease treating aboriginals as children or irrational animals; (2) Investigate their rights and claims; (3) Raise a compensation fund from revenues from ungranted lands and exchange compensation for collective extinguishment of claims; (4) Provide for aged and infirm in their own communities; (5) Subsidize schooling and trade training; (6) Pension superannuated chiefs; (7) Encourage adoption of colonist lifestyle (fixed abodes, agriculture).

34. S.T. Rand, “The Micmac Indians: Their Legends” [*Halifax*] *Provincial Monthly Magazine* (April 1853) at 133. Rand paraphrased the remark from Haliburton’s, *Historical and Statistical Account*, vol. 1, *supra* note 7 at 1.

fables in legal theory. Although Gesner, Brown, Bromley and some others would not overlook the usurpation of aboriginal lands, and although the remarkable Rand was willing to sound a radical call for financial reparation, none was moved to complete the argument by proposing a way for the law to recognize a continuing aboriginal entitlement in the soil, the sea and their products. Not even Rand asserted that Amerindians of the 19th century retained the sort of claim that could be vindicated in court. That imaginative leap was postponed a further century and more. One reason why articulation of the Amerindian grievance in its legal dimension was delayed so long after this bold beginning was that Rand's rights agitation was soon forgotten; only his work on Micmac and Maliseet "fables" continued to resonate with the concerns of the dominant society.

Although the title of the present offering refers to "19th-century" intellectuals, in fact writing on aboriginal dispossession plays out not long after Rand's intervention in the middle of that century. Then followed a long hiatus until the 1920s, when attention turned at last to exploring the significance of the 18th-century treaties, though not to the question of aboriginal dispossession at large. That 19th-century discussion of aboriginal entitlement should end just about the time that census results made it clear that Amerindians were not, after all, facing demographic extinction would seem implausible were there not an evident political factor helping account for it. The intellectuals who took the part of Maritime aboriginals raised the spectre of the unlawfulness of aboriginal dispossession in order to awaken humanitarian interest in the Amerindians of their own day. Their prime and perhaps exclusive object was not to litigate a vindication of ancient wrongs but to stimulate a coherent, generous response to the predicament of the survivors. Accordingly, when the Confederation settlement of 1867 gave responsibility for "Indians and land reserved for Indians" to the federal government, the urgency for a principled response to the question by New Brunswick and Nova Scotia dissipated. Maritime political culture had long preferred to see aboriginal matters as "national" (*i.e.*, Imperial) rather than colonial responsibility. With the shift of responsibility to the new administration at Ottawa, concern for a local policy response to the predicament of contemporary Amerindians fell beneath the horizon of public concern.